86-1466

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No.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JOHN W. MC NEIL,

Petitioner,

No. 85-1398 vs.

ECONOMICS LABORATORY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Petitioner requests review of the majority opinion of the Seventh Circuit Court of Appeals on his cross-appeal of the District Court's denial of front pay and liquidated damages under the Age Discrimination in Employment Act of 1967 (ADEA) and presents the following questions:

1. Is front pay a remedy under the ADEA which is to be uniformly recognized and applied by the circuits so as to implement enforcement of the ADEA?

2. What evidence will establish a prima facie case of entitlement to front pay, and does the denial of front pay to petitioner illustrate that the protected group under ADEA has been deprived of a just consideration of that issue which requires redress?

3. What definite role is to be

assigned the liquidated damage clause of §7(b) of the ADEA as an essential means of compelling compliance with the ADEA, and in light of that function and as illustrated in the case at bar, does the lower court properly interpret and apply the Supreme Court's definition of "willful" as published in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985).

4. In the context of question 3, what evidence establishes a prima facie case of a willful violation, and has petitioner as a representative of the protected group been denied just consideration of the evidence under a proper application of the law?

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OPINION BELOW

The Opinion of the Seventh Circuit Court of Appeals is contained herein as Appendix A and the citation thereof is ___ F.2d __ (1986.)

JURISDICTIONAL STATEMENT

(i) Judgment of the Seventh Circuit Court of Appeals was rendered on August 27, 1986. (App. A)

(ii) Petitioner's timely Petition for

Rehearing on his cross appeal (No. 85-1398) was denied on December 8, 1986. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked in 28 U.S.C. §1337.

STATUTES AND REGULATIONS

29 U.S.C. §621, et seq., and Fair Labor Standards Act, 29 U.S.C. §201-219; specifically involved is 29 U.S.C. §623(a) 1 (App. E); §626(a)(App.F); §626(b)(herein called §7b) and 29 C.F.R. 2617 [44 FR 66791] (App. G).

STATEMENT OF THE CASE

Petitioner, employed thirty-two (32) years with respondent, was terminated on January 23, 1981 without prior notice or warning. The District Court, after an eleven (11) day bench trial, ruled on January 30, 1985 that respondent had unlawfully discharged petitioner in viola-

tion of the ADEA and awarded him damages of Eighty-eight Thousand ($88,000) Dollars, but denied him front pay, and further determined respondent's violation was not willful.

Respondent appealed to the Seventh Circuit Court of Appeals and petitioner cross appealed. The Court of Appeals, in their decision of August 27, 1986, affirmed the Order of the District Court.

On December 8, 1986 the Court of Appeals denied the Petition for Rehearing of respondent,[1] and also denied petitioner's Petition for Rehearing on his cross appeal.[2]

At discharge, petitioner was an assistant vice president; over budget in sales; no negative comments in his personnel file from 1969 to 1981; excellent

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[1] App. D.
[2] App. C.

relationship with his customers.

Henry Snyder, the supervisor responsible for petitioner's termination, did not check his sales records, his personnel file, or talk to his immediate supervisor who was "surprised" at petitioner's termination.

At the same time, respondent was understaffed in petitioner's division, advertising for help in an area of petitioner's expertise, and implementing a declared policy by Snyder to replace the older employees with younger people.

No records or documentation of any kind were kept by respondent concerning petitioner's termination. The trial judge, as the finder of fact, found respondent's proffered reasons for petitioner's termination not only pretextual, but without credence.

ARGUMENT FOR GRANTING THE WRIT

The 1960s, while fraught with violence, produced some substantial "civil rights" legislation designed to protect downtrodden elements of our society. This petition addresses one category of those requiring protection, the older American worker.

Age discrimination in employment is a problem that faces thousands of American workers.2/

Many employers establish arbitrary age limits which both restrict the availability of new jobs and force the premature

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2/ See H.R. Rep. No. 805, 90th Cong., 1st Sess. 2 (1967); Legal Problems Affecting Older Americans: Hearings Before The Special Senate Comm. on Aging, 91st Cong., 2nd Sess. 19 (1970); U.S. Dept. of Labor, Report to the Congress on Age Discrimination in Employment under §715 of the Civil Rights Act of 1964: Research Materials 67-69; Age Discrimination in Employment: The Problems of the Older Worker, 41 NYUL Review 383, 384-88, 1966.

retirement of old employees.3/ Even during periods of relatively low unemployment the percentage of older persons unable to find work is stated as being disproportionately high.4/

President Johnson in his "Older Americans" message of January 23, 1967 (113th Cong. Record 34743-44 (1967)) expressed the bipartisan sentiment of the Congress that age discrimination constituted a serious economic threat to the nation and represented even a greater loss

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3/ See 113 Cong. Rec. 31256-57 (1967); Age Discrimination in Employment: Hearings on Age Discrimination Bills before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 22 (1967).

4/ Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess. 7 (1967); Kovarsky and Kovarsky, Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment, 27 Vand. L. Rev. 839, 840 (1974); 41 NYUL Review at 384.

in the "cruel sacrifice" and unhappiness which joblessness imposes on those citizens and their families.

Congress might have amended Title VII of the 1964 Civil Rights Act to include age as a protected classification. Reflecting the depth of concern on the issue, however, Congress dealt specifically with the matter by passing the Age Discrimination in Employment Act (ADEA)5/ which was intended to insure that decisions concerning employment would be made on objective evaluations rather than on misconceptions about the effects of age on ability.

Does the evidence indicate the ADEA has been successful in achieving this objective? The answer is a resounding No! As in the area of other "civil rights",

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5/ 29 U.S.C. §§621-634.

the warfare is intense, political, and fraught with tremendous economic casualties to the "protected group."

The U.S. Department of Labor, Bureau of Labor Statistics, reveals that in the 55 to 64 age bracket, those employed of the total employed civilian labor force dropped from 13.8% in 1970 to 10.6% in 1985 and 10.4 in 1986; and those employed of the total employed civilian labor force age 65 and over dropped from 3.8% in 1970 to approximately 2.6% in 1985 and 1986. The evidence thus indicates the frustration of a national policy designed to prevent discrimination of the older employees in the work force.

This case illustrates why the ADEA is a hollow victory for the "protected group," and proclaims a solution.

While the cost of litigation, the delay in litigation, the difficulty of

counsel obtaining proper reimbursement for fees and costs in this problematical area of litigation are in themselves overwhelming barriers, this case illustrates, we contend, the two critical reasons for the crippling of national policy as expressed in the ADEA.

Simply stated, they are the failure to include front pay as well as sanctions for a willful violation of the Act, as realistic civil remedies in the enforcement of the ADEA.

I.

THIS COURT SHOULD DECLARE FRONT PAY AS A REMEDY UNDER THE ADEA AND PROVIDE CLEAR EVIDENTIARY GUIDELINES FOR ITS APPLICATION

When the trial judge wrote his opinion in this case on January 30, 1985, the Supreme Court had not ruled on front pay, the Seventh Circuit had not ruled on front pay, and the circuits were in conflict.

The judicial climate enabled the defendant to argue to the trial court, as he did to the court of appeals,

> "While the United States Supreme Court has not addressed the issue, the Federal Appellate Courts are split on whether future damages are even available under the ADEA. . . . [s]everal courts have rejected claims by plaintiffs that the ADEA permits damages for future economic loss or have denied such awards as too speculative." (citing cases)6/

The trial judge denied the plaintiff front pay although he found that John McNeil had attempted to obtain employment without success and stated:

> That a person in his position was not successful in his quest for employment is not at all surprising to this court. It is in fact a classic example of one reason for the passage of the ADEA, namely, to prevent the discharge of employees who are in the twilight of their careers and

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6/ Def's Reply Brief to the 7th Cir. Court of Appeals, p. 29, 30.

who have little prospect for re-employment.7/ (emphasis supplied)

The trial court's language emits a hidden plea for evidentiary guidelines in the area of front pay. The Appellate Court joined the apparent majority, and here recognized for the first time front pay as an available remedy.8/ In spite of McNeil's age, however,9/ while Judge Cudahy would have remanded for further proceedings on the issue of front pay, the majority refused to remand and denied petitioner's request for a rehearing.

In transparent contrast to the philosophy of the Seventh Circuit majority opinion here, the Sixth Circuit in Davis v.

7/ Trial Court Opinion, App. B.

8/ Appellate Court Opinion, App. A.

9/ Age 61 when terminated, 65 at the trial, and 67 at the time of this brief.

Combustion Engineering, Inc., 742 F.2d 916, 923 (6th Cir. 1984), said:

> We emphasize, however, that an award of front pay must be governed by the sound discretion of the trial court and may not be appropriate in all cases. For example, the award of front pay to a discriminatorily discharged 41 year old employee until such time as he qualifies for a pension might be unwarranted. On the other hand, the failure to make such an award for an employee age 63, and likewise discriminatorily discharged, might be an abuse of discretion. (emphasis ours)

The Tenth Circuit in Equal Employment Opportunity Commission v. Prudential Federal Savings and Loan Assoc., 763 F.2d 1166, 1172 (10th Cir. 1984) (cert. denied 106 S.Ct. 530) (quoting Koyen v. Consolidated Edison Co., 560 F.Supp. 1161, 1168 (S.D.N.Y. 1983)), stated:

> The manifest purpose of this broad grant of legal and equitable power is to enable the courts to fashion whatever remedy is required to fully compensate an employee for the economic

> injury sustained by him. . . . [T]o authorize an award of future loss of earnings in appropriate cases (and) . . . to deny such authority would remove a deterrent force against future violations.

So while the majority of circuits recognize the principle of front pay,10/ without guidelines, front pay realistically is an illusive phantom. The beneficiary of this position has been the errant employer discriminating in violation of the ADEA.

Absent the teeth of front pay as a realistic remedy under the provisions of the Act, an employer is under no real risk in the termination of an employee within the protected age bracket. The employer

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10/ In addition to the 6th, 7th and 10th Cir., Whittlesey v. Union Carbide Corp., 742 F.2d 724 (2nd Cir. 1984); Maxfield v. Sinclair International, 766 F.2d 788 (3d Cir. 1985) (cert. denied 106 S.Ct. 796); O'Donnell v. Georgia Osteopathic Hospital, Inc., 748 F.2d 1543, 1551 (11th Cir. 1984).

is thus permitted to "borrow" the violated employee's wages for a lengthy period of time, for the most part without intereest, and with the possibility that repayment will never be required.

The evidentiary guidelines for burden of proof for a prima facie case established by this court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), made the ADEA a viable act. Similar account needs to be taken by this court on the issue of front pay.

In adapting the McDonnell Douglas burden of proof format to the front pay issue, the employee would be required to show that he had made legitimate efforts to obtain similar type employment with similar pay and benefits without success. The burden would then shift to the employer to show the employee either had not made the effort described, or that

similar jobs were actually available to him which he had either refused to accept or failed to take advantage of. The burden would then shift back to the employee to demonstrate that the evidence produced by the employer was inapplicable or incorrect. An employee 60 years or older terminated in violation of the provisions of the ADEA would establish a prima facie case as a matter of law entitling that employee to front pay, unless rebutted by clear and convincing evidence on the part of the employer that the terminated employee could in fact have obtained employment elsewhere of a same or similar character at the same or similar wage scale.

This case represents a unique factual setting enabling this Court to not only unanimously establish front pay and the

burden of proof required, but illustrate the application.

II.

THIS COURT SHOULD PROVIDE CLEAR EVIDENTIARY GUIDELINES UNDER SECTION 7(b) OF THE ADEA, PARTICULARLY IN A NON BFOQ CIRCUMSTANCE.

The paucity of cases declaring a willful violation of the ADEA is a judicially created reason for the ineffectiveness of the ADEA. A clear and unequivocable declaration is essential to require the realistic application of the provisions of Section 7(b) as a necessary weapon in the arsenal to prevent discrimination.

In Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985), this court postulated a definition of a "willful" violation which is more appropriate to a BFOQ situation with which the court was there confronted.

In a non BFOQ situation, however, that definition of "willful" leaves each circuit pretty much to its own philosophical evaluation of the evidence to determine if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." That the Seventh Circuit is "more stringent" in its evidentiary requirements has been recognized by the Tenth Circuit opinion, Hagelthorn v. Kennecott Corp., 710 F.2d 76 (2nd Cir. 1983). That "stringency" is reflected in the opinion of the district court in stating that plaintiff carried a very "heavy burden" in establishing willful.11/

The Seventh Circuit Court of Appeals stated the trial court's finding was "not

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11/ Dist. Ct. Opin. (App. B).

clearly erroneous especially in light of Thurston." (emphasis ours)

Thurston is thus misinterpreted and misapplied in non BFOQ cases, and the burden of proof issue in establishing willful remains unresolved and in conflict in the circuits.

It is argued the tone of Thurston permits, and perhaps requires, a lower court to avoid the finding of willful as being a "too harsh" interpretation of the ADEA, except in extremely rare situations.

Again the guidelines of McDonnell Douglas are adaptable and necessary. If plaintiff employee establishes a discriminatory motive, and the articulated reasons for discharge by the employer are determined by the finder of fact to be pretextual in content, not in good faith, or similar findings, then the burden would shift to the employer to demonstrate that

he made every reasonable effort to determine whether the plan he was following would constitute a violation of the law. If, on the failure to produce such evidence, or upon his production thereof, if the employee sustained the burden to show that such proffered "reasonable effort" was pretextual, a willful violation of the Act would be proven with the consequence of double damages.

The instant case contains the ingredients necessary to not only promulgate such a burden of proof formula, but its application.

This is one of those rare cases which illustrate not only a declared policy of discrimination by the employer, but a record replete with illustrations of the application of such policy, and at the same time absolutely devoid of any effort

on the part of the employer to comply with the Act's requirements for recordkeeping, 12/ or its own company policy on record-keeping,13/ when dealing with an employee within the protected group. Respondent's untruthful, or at best misleading, answers to plaintiff's discovery interrogatories also sought to avoid the disclosure of such failure.

CONCLUSION

Either the ADEA is to be a viable national policy utilizing the tools of front pay and Section 7(b) of the Act to see that it is properly implemented, or it simply becomes a viper dissipating the

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12/ 29 CFR 2617 [44 FR 66791] [effective 11.21.79] [§1627.3 under subpart B - record to be kept relating to age; Notice to be posted], App. G.

13/ Respondent's Official Company Publication; App. H; Company's Policy Manual, p. 3 and p. 21-A, App. H.

court's time and energy and overburdening the judiciary with tortuous and expensive litigation with limited success.

As aptly illustrated by this case, the Act which is to protect this extremely important segment of our society is willfully abused without fear of reprisal. The failure to include front pay and the omission of sanctions has reduced one of the most important pieces of civil rights legislation to mere advice or a caution among America's big business concerns, rather than a law embodying national policy to be obeyed.

Like a voice crying in the wilderness, so do older Americans cry for justice in the marketplace. To refuse their cry and allow grievous wrongs to go unanswered in this area is to turn our back on that segment of society which have been the

leaders in the very areas of commerce and business now dispossessing them of their rights in alarming numbers.

The record here declares most eloquently the plight of such a representative individual. Wrongfully terminated in 1981, he represents that group of Americans which still await justice.

Respectfully submitted,

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A P P E N D I X

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 85-1332 and 85-1398

JOHN W. MCNEIL,

Plaintiff-Appellee,
Cross-Appellant,

v.

ECONOMICS LABORATORY, INC.,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court
for the Northern District of Illinois, Western Division.
No. 81 C 20150—**Stanley J. Roszkowski,** *Judge.*

ARGUED FEBRUARY 13, 1986—DECIDED AUGUST 27, 1986

Before CUDAHY and COFFEY, *Circuit Judges,* and EVANS, *District Judge.**

CUDAHY, *Circuit Judge.* Plaintiff John McNeil brought an action pursuant to the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. § 621 *et seq.*, against his employer, Economics Laboratory, Inc., for his discharge from employment. The district court, in a bench trial, granted judgment for the plaintiff in the amount of

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* Honorable Terence T. Evans, District Judge for the Eastern District of Wisconsin, is sitting by designation.

$88,000, plus costs and attorney's fees. The defendant appeals and plaintiff cross appeals. We affirm.

I

In 1949 McNeil began working for Klenzade-New York, a company that specialized in the production and sale of sanitation chemicals and equipment for the dairy, beverage and food industries. In 1962 Economics Laboratory purchased Klenzade-New York. McNeil continued to work for Klenzade as manager of Klenzade's New England Division. In 1966 McNeil was transferred from this position to the position of Eastern Area Sales Manager for the Klenzade Division. In this position he managed a sales staff that sold chemical cleaning compounds to various industries. In 1972 McNeil became the Assistant Vice President and Sales Manager of the Engineering Division. There was some evidence of friction between McNeil and his co-workers, but the district court found that his personnel file contains only favorable performance appraisals. Dist. Ct. Order at 11. Plaintiff underwent treatment at an alcoholism treatment center in 1978, apparently as a result of pressure by his superiors. After his completion of the rehabilitation program, McNeil was given the position of Assistant Vice President-Original Equipment Manufacturer Sales Manager for the Equipment Engineering Department of the Klenzade Division. In this position he sold cleaning systems to third party distributors of Klenzade equipment.

At the time of plaintiff's discharge he was supervised by James Watson, who reported to Robert Sistowicz, who in turn reported to Henry Snyder. Synder testified that in January 1981 he was instructed by his superior to reduce expenses as part of a corporation-wide expense reduction effort. Snyder claims to have directed Richard Rintelmann, Vice President of Marketing for the Klenzade Division, to make recommendations for the expense reduction. Rintelmann later recommended that eleven positions be eliminated, including plaintiff's. Snyder

adopted Rintelmann's recommendation that McNeil be terminated. McNeil was sixty-one at the time of his discharge. McNeil's duties were taken over by Robert Price and Watson.

Although others whose positions were eliminated were offered other positions, plaintiff was not. Defendant argues that, although positions were available in Chemical Sales, plaintiff was not offered one because the friction that plaintiff had previously created made such a position inappropriate for plaintiff. Plaintiff, however, was offered a nonsalaried, commission-based position as a sales representative.

II

Section 623 of the ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). To establish a violation of the ADEA plaintiff must prove that he was discharged because of his age. *See Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1423-24 (7th Cir. 1986); *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984). The plaintiff "must prove not that age was the sole factor motivating the employer to discharge him but that age was a 'determining factor,' in the sense that he would not have been discharged 'but for' his employer's motive to discriminate against him because of his age." *La Montagne*, 750 F.2d at 1409. The plaintiff may meet this burden by presenting either direct or circumstantial evidence. *Id.*

When the plaintiff offers indirect proof of discrimination we apply the analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The plaintiff must first prove a prima facie case of discrimination by showing 1) that he or she was in the

protected class; 2) that the plaintiff was doing the assigned job well enough to meet the employer's legitimate expectations; 3) that in spite of performance the plaintiff was discharged and 4) that the employer sought a replacement. *Id.* We have noted, however, that in a reduction-in-force case the last element is irrelevant. *See Stumph v. Thomas & Skinner Inc.*, 770 F.2d 93, 96 (7th Cir. 1985); *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985). We have held that a prima facie case is established in a reduction-in-force case by 1) showing that the plaintiff was within the protected age group; 2) showing that the plaintiff was adversely affected, either by discharge or demotion; 3) showing that the plaintiff was qualified to assume another position at the time of discharge or demotion; and 4) producing circumstantial or direct evidence from which a fact finder might reasonably conclude that the employer intended to discriminate in making the employment decision in issue.[1] *See Dorsch*, 728 F.2d at 1424; *Matthews*, 769 F.2d at 1217.

Once the plaintiff has established a prima facie case, the burden falls on the defendant to articulate lawful reasons for the discharge. *La Montagne*, 750 F.2d at 1409. If the defendant meets its burden of production, the plaintiff must prove "that the proffered reasons are a pretext, by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence." *Id.*

Defendant argues that a reduction-in-force analysis should be applied to this case. We will assume, without reaching the issue, that the discharge occurred as part of a reduction in force. The district court held that plain-

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[1] Judge Flaum has argued persuasively that this last requirement may impose too heavy a burden upon a plaintiff. *See Matthews*, 769 F.2d at 1219-24 (Flaum, J., concurring). He argued that the plaintiff should be permitted to show instead that he or she was discharged while younger employees either were retained to perform the plaintiff's job or permitted to transfer into some other job for which the plaintiff was qualified. *Id.* at 1224.

tiff had established a prima facie case under a reduction-in-force analysis:

> When the defendant in an age discrimination case has a reduction in force, a prima facie case of age discrimination may be established if the plaintiff shows that he was within the protected age bracket, that he was discharged, that he was qualified to assume another position at the time, and that there is direct or circumstantial evidence of the defendant's intent to discriminate. There is ample evidence in this case to satisfy all of these elements.

Dist. Ct. Order at 13-14. Defendant does not dispute that the first two elements were established.

Defendant, however, argues that it had legitimate business reasons not to offer another position to plaintiff. But the district court held that at the time of McNeil's termination, defendant was advertising for positions in the Klenzade Division's sales force and that plaintiff was qualified to perform the duties of such a position. This finding is not clearly erroneous. Defendant argues that the only sales management positions for which it placed any advertisements were in Chemical Sales. Defendant argues that McNeil was unsuitable for these positions "because of past incidents involving customers and fellow employees."[2] Reply Brief of Defendant at 11. We cannot

[2] Although defendant argues at length that the district court erroneously concluded that McNeil was performing his job satisfactorily, *see* Defendant's Brief at 24-27, 33-42, we see no reason to address these findings. Defendant clearly adopts the position that "McNeil was terminated solely because of a reduction in force." Reply Brief of Defendant at 9. Defendant also states: "*John McNeil was not discharged for cause because of his sales or his behavioral/drinking problems. His position was eliminated because of a reduction in force caused by a need to reduce expenses.*" *Id.* at 10-11 (emphasis in original). Further, defendant does not argue that plaintiff's job performance in the Engineering Division was the reason why he was not offered another position in the Chemical Division. *See* Defendant's Brief at 35, 41.

say, however, that the district court clearly erred in concluding that the conduct to which defendant refers should be accorded little weight because it occurred long before the termination and was not thought to be serious enough to be recorded in his monthly or yearly appraisals. Nor did McNeil's supervisor warn him that his conduct would not be tolerated. The district court could therefore have found defendant's proffered reason to be pretextual.

In addition, there was sufficient evidence from which the district court might reasonably have inferred that defendant had intended to discriminate. The district court held that the plaintiff had "presented substantial direct evidence of age discrimination. . . . [t]he record reveals that Snyder intended to get rid of the inherited sales force of 'old salesmen' and replace them with 'bright young people'." Dist. Ct. Order at 10-11. Various statements made by Snyder support these conclusions.[3]

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[3] A monthly progress report (MPR) from Snyder to S. Osborn dated July 11, 1980, contains the following comment:

> We are putting our emphasis at the moment on what I call the nuts and bolts training . . . . I think it's particularly important that we provide a steady flow of capable people who can handle the servicing and selling needs of existing accounts so we can eliminate our dependence on over-paid and under-motivated veterans of 10 or 15 or 20 years to get the sort of experience necessary to provide reasonable plant service competence.

App. at 421 ("App." refers to the Joint Appendix). Snyder's MPR dated December 16, 1980, comments:

> By being able to provide a comprehensive standardized, centralized high-quality technical training program, we are able to make ourselves independent of our reliance on old-timers without the right motivation or education and can hire bright young people fresh out of college and give them the necessary training in a relatively short space of time. It will also let us get at meeting our affirmative action objectives in a meaningful way.

(Footnote continued on following page)

Defendant argues that these comments can be given an innocent, even laudable interpretation. It argues that the comments do not reveal an intent to terminate older employees, but rather disclose a plan to provide centralized training that would permit it to realize its affirmative action goals. It may be that the comments are capable of more than one interpretation. Nonetheless, the interpretation made by the district court is not clearly erroneous.

Defendant next argues that these comments are not legal evidence of age discrimination because "abstract age comments or generalities are insufficient to show age discrimination." *Williamson v. Owens-Illinois, Inc.*, 589 F.

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[3] *continued*

App. at 425. Snyder's MPR dated February 9, 1981, states:

> A major factor for the future will, of course, be the success of the Klenzade Institute. We are well on our way in this area, but as you know, the work is all up front, and the benefits are one-two years out. However, within several years, we should find ourselves substantially independent of our inherited sales force and able to rely on our ability to hire, train and motivate bright, young people.
>
> . . . .
>
> John McNeil was also terminated . . . . I feel very strongly, as I told you separately, Bart, that when faced with the necessity of terminations, it is certainly not in the company's best interest to terminate effective, hard-working newer employees who get trapped in a reduction in force through no fault of their own, while leaving on the payroll employees who simply are not either performing adequately or doing a job worth doing, but who have just been around a long time.

App. at 429-31. Snyder's MPR dated March 13, 1981, includes the following comment:

> [W]e simply can't put people in pure sales jobs such as these without proper training. When we created these positions, we staffed most of the openings with people such as H.J. Johnson, who we thought were old pros. It turned out that most of them were just old, and we really didn't have an internal training program up and operating and able to provide the needed replacements.

App. at 434.

Supp. 1051, 1059 (N.D. Ohio 1984), *aff'd in part and rev'd in part without opinion*, 782 F.2d 1044 (6th Cir. 1985). In *Williamson* the court held that an isolated age-related comment did not show defendant's proffered reason for the discharge to be pretextual because that statement, taken in context, was totally innocuous.[4] *Id.* It was in this context that the *Williamson* court made the statement we have quoted. In the case before us the district court did not find the statements to be innocuous. Further, plaintiff relies upon these statements only to establish his prima facie case (not to show pretext). The plaintiff, in establishing his prima facie case, need only produce evidence from which the court could conclude that the employer intended to discriminate and this evidence may be circumstantial.

Defendant also argues that the comments cannot be relied upon because there is no nexus between the comments and any action taken with respect to McNeil. But we would suppose in the ordinary case that such a connection would have to be inferred. And the district court was entitled to rely upon the comments to support an inference that defendant intended to discriminate. It would be unusual to find direct evidence of intent of this kind and certainly this is not required. Snyder's comments are reasonably read to reveal that he intended to get rid of old salesmen.[5] Snyder authorized McNeil's discharge. Fur-

[4] Similarly, the other cases cited by defendant do not support its position. In *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980), the court held that the particular statements at issue were only truisms and did not indicate a discriminatory purpose. In *Reilly v. Friedman's Express*, 556 F. Supp. 618, 624-25 (M.D. Penn. 1983), the court held that an isolated abstract comment did not establish pretext. In *Abraham v. Field Enterprises*, 511 F. Supp. 91, 94 (N.D. Ill. 1980), the court dismissed the claims for lack of subject matter jurisdiction, without ever mentioning any allegedly discriminatory statements.

[5] Defendant's argument that the comments cannot be relied upon because they were directed only toward the chemical sales force, while McNeil worked in the Equipment Engineering Department, is unpersuasive.

ther, this is not a case in which plaintiff presents one isolated comment. Rather, there are a series of comments that, read together, support the necessary inference and the resulting finding is not clearly erroneous.

III

Plaintiff appeals the district court's finding that the violation was not "willful" and thus liquidated damages were not appropriate under the statute. 29 U.S.C. § 626(b). We have held that willfulness is established "only if there is some showing as to the defendant's knowledge of the illegality of his actions." *Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 155 (7th Cir. 1981) (footnote omitted); *see Orzel v. City of Wauwatosa Fire Department*, 697 F.2d 743, 757-58 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983). Plaintiff must show that defendant's actions "were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA."[6] *Syvock*, 665 F.2d at 156 (footnote omitted); *Orzel*, 697 F.2d at 758. It is not enough, however, for the employer to simply know of the potential applicability of the ADEA. *See Trans World Airlines v. Thurston*, 105 S. Ct. 613, 625 (1985). The Supreme Court noted that it would be virtually impossible for an employer to show that he was unaware of the Act and its potential applicability because employers are required to post ADEA notices. *Id.*

Plaintiff believes that defendant's violation was willful because there was substantial evidence of discriminatory intent and Snyder admitted that he was aware that the termination of an employee on the basis of age would

[6] The Supreme Court recently held that it was reasonable to use a standard under which a "willful" violation would be found if the employer knew, or showed reckless disregard for the question whether, its conduct was prohibited by the ADEA. *See Trans World Airlines v. Thurston*, 105 S. Ct. 613, 624 (1985).

violate the ADEA.[7] The district court, however, felt that there was "insufficient evidence on the question of whether the defendant knew or should have known that its actions violated the ADEA." Dist. Ct. Order at 15. We may reverse the district court only if its finding is clearly erroneous. *See Orzel*, 697 F.2d at 759. And the finding in question is not clearly erroneous, especially in light of *Thurston*.[8]

IV

Plaintiff appeals the district court's award of $88,000 in damages, which represents his net loss for the period between his discharge and the judgment below. Plaintiff argues that the district court should have awarded him front

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[7] Snyder gave the following testimony:

> Q. And you're familiar with the fact there is a federal law on age discrimination, are you not?
>
> A. Yes. As I testified before, I'm familiar, in general, with the fact that there is a federal law on age discrimination.
>
> . . . .
>
> Q. You would be familiar with the fact that the termination of an employee on the basis of age would be a discrimination [sic] of the act, are you not?
>
> A. Yes.

Tr. at 76-77.

[8] In *Syvock* we considered, among other things, that the defendant had attempted to show that Syvock was laid off and not rehired in part because of his poor production capabilities. Although the jury was not persuaded by this explanation, "defendant's showing was not so weak as to allow no room for any conceivable explanation for its actions except age discrimination." *Syvock*, 665 F.2d at 157. We held that there had not been a willful violation under 29 U.S.C. § 626(b). Similarly, in the case before us defendant has presented some evidence that the plaintiff was not offered another position because of friction between him and the department in which jobs were available. Although we would hesitate to say that such evidence is always sufficient to show that a violation is not willful, we think that it affords some support to the district court's finding.

pay up to age seventy.[9] Because plaintiff was sixty-five years old at trial, the issue is whether he should be compensated for the additional five years between judgment in this case and the age of seventy.

The ADEA authorizes the courts to grant "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter." 29 U.S.C. § 626(b). This circuit has not yet decided whether this grant of authority permits the district court to award front pay. All of the circuits that have decided the issue, however, have held that front pay is an available remedy in appropriate cases brought under the ADEA. *See Wildman v. Lerner Stores*, 771 F.2d 605, 616 (1st Cir. 1985); *Maxfield v. Sinclair International*, 766 F.2d 788, 795-96 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 796 (1986); *EEOC v. Prudential Federal Savings & Loan Assoc.*, 763 F.2d 1166, 1172-73 (10th Cir.), *cert. denied*, 106 S. Ct. 312 (1985); *Goldstein v. Manhattan Industries*, 758 F.2d 1435, 1448-49 (11th Cir.), *cert. denied*, 106 S. Ct. 525 (1985); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); *Davis v. Combustion Engineering*, 742 F.2d 916, 922-23 (6th Cir. 1984); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982); *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982). We agree that front pay may be an available remedy in appropriate cases.

Section 626(b) grants broad remedial powers that enable the courts to fashion whatever remedy is required to make the plaintiff whole. *See Wildman*, 771 F.2d at 616; *Whittlesey*, 742 F.2d at 727. A plaintiff is made whole when he or she is returned to the position that such a victim would have occupied had the discrimination not occurred. *See Maxfield*, 766 F.2d at 796; *EEOC*, 763 F.2d at 1173. Although reinstatement is usually the preferred remedy, reinstatement is not always appropriate. *See*

[9] At age seventy compulsory retirement could be imposed without violating the ADEA. *See* 29 U.S.C. § 631.

Wildman, 771 F.2d at 616; *Maxfield*, 766 F.2d at 796; *EEOC*, 763 F.2d at 1172-73; *Goldstein*, 758 F.2d at 1448; *Whittlesey*, 742 F.2d at 728. For example, there may be no position available or the employer-employee relationship may be pervaded by hostility. *See Whittlesey*, 742 F.2d at 728; *EEOC*, 763 F.2d at 1172. When reinstatement is infeasible or inappropriate, front pay may be appropriate to make the plaintiff whole. In determining whether to award front pay, the court should consider all of the circumstances of the case. *Wildman*, 771 F.2d at 616; *Davis*, 742 F.2d at 923. Front pay may be indicated especially when the plaintiff has no reasonable prospect of obtaining comparable employment or when the time period for which front pay is to be awarded is relatively short. *See Whittlesey*, 742 F.2d at 729; *Davis*, 742 F.2d at 923 (failure to award front pay to 63-year-old plaintiff may be abuse of discretion). On the other hand, front pay may be less appropriate when liquidated damages are awarded. *See Wildman*, 771 F.2d at 614; *Cancellier*, 672 F.2d at 1319. Of course the duty to mitigate damages may limit the amount of front pay available. *See Maxfield*, 766 F.2d at 796; *EEOC*, 763 at 1173; *Whittlesey*, 742 F.2d at 728-29.

Although an unreasonable refusal of an offer to reinstate will preclude recovery of front pay, *see O'Donnell v. Georgia Osteopathic Hospital*, 748 F.2d 1543, 1550 (11th Cir. 1984), a plaintiff need not request reinstatement as a prerequisite to recovering front pay when reinstatement would be inappropriate. *See EEOC*, 763 F.2d at 1173 n.2; *see also Maxfield*, 766 F.2d at 796-97 (complaint that contains request for future damages is sufficient to preserve issue).

The decision whether or not to award front pay is, of course, within the discretion of the district court. *See Wildman*, 771 F.2d at 616; *Goldstein*, 758 F.2d at 1448; *Davis*, 742 F.2d at 923. We need only review the decision of the district court for an abuse of discretion. Here the district court stated: "The court rejects the plaintiff's argument that he would have received the promotion de-

scribed, and further rejects the plaintiff's position that he is entitled to be compensated for employment to age 70. There is simply insufficient evidence to support either of those propositions." Dist. Ct. Order at 16. This determination was not an abuse of the district court's discretion.[10]

We therefore affirm the judgment of the district court.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[10] The author of this opinion believes that the district court's terse statement did not set forth sufficient reasons to allow us to evaluate its exercise of discretion. Although the author would therefore remand for further consideration of the front pay issue, his two colleagues believe that the district court's statement was adequate.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

JOHN W. McNEIL, Plaintiff,	)
vs.	) No. 81 C 20150
ECONOMICS LABORATORY, INC. Defendant.	)

ORDER

FACTS

Plaintiff was born April 6, 1919, and is a United States citizen currently residing in Roscoe, Illinois.

Upon his termination from employment with defendant, plaintiff filed a timely charge of age discrimination with the Equal Employment Opportunity Commission.

Following the issuance of a notice to plaintiff by the Commission terminating its investigation of plaintiff's charge, plaintiff filed a timely two-count

complaint before this court.

Both counts have been amended. Count I of plaintiff's Complaint, as amended, alleges that defendant discriminatorily terminated plaintiff's employment with defendant on the basis of plaintiff's age. Count II of plaintiff's Complaint, as amended, alleges that plaintiff's termination from employment breached a contract or implied contract of employment.

Defendant is a Delaware corporation that produces and sells institutional, consumer and industrial detergents and cleaning systems. Its principal place of business is St. Paul, Minnesota, and it maintains equipment engineering offices in South Beloit, Illinois, where plaintiff was employed.

This court has personal jurisdiction over the parties to this action and has

subject matter jurisdiction over the underlying dispute.

Plaintiff commenced working for Klenzade-New York, a distributor of Klenzade products partially owned by the Klenzade Company, as a salesman on April 1, 1949. In 1962, defendant purchased the Klenzade Company and shortly thereafter purchased all interests in Klenzade-New York. The Klenzade Company is currently the Klenzade Division of defendant, Economics Laboratory, Inc. Klenzade specialized and specializes in the production and sale of sanitation chemicals and equipment for the dairy, beverage and food industries.

On June 1, 1962, plaintiff was transferred from his position as a salesman for defendant's Klenzade-New York operation to the position of Manager of Klenzade's New

England Division.

On July 1, 1966, plaintiff was promoted to the position of Eastern Area Sales Manager for the Klenzade Division. On October 4, 1968, plaintiff was promoted to the position of Assistant Vice-President, Klenzade Sales.

Plaintiff remained in the position until July 1, 1972, when he became Assistant Vice-President and Sales Manager for the Equipment Engineering Division of defendant. For approximately one year Equipment Engineering had been a separate division of defendant.

On January 1, 1977 the Equipment Engineering Division once again was made a department of defendant's Klenzade Division.

On October 2, 1978, plaintiff was promoted to the position of Assistant Vice-President - Original Equipment

Manufacturer (OEM) Sales Manager for the Equipment Engineering Department of defendant's Klenzade Division, the position he held at the time of his discharge. As of September 25, 1979 the position had an annual sales budget of $700,000.00.

In December, 1978 Henry Snyder was hired by defendant as Vice-President of the Klenzade Division. For several months preceding the discharge of the plaintiff, the record contains evidence that Snyder endorsed a policy that youth was a qualification for a position within the Klenzade sales force. Snyder's written statements contained substantial evidence of his desire to get rid of the inherited sales force of old people and to replace them with bright young people.

Plaintiff received a raise effective January 1, 1981 increasing his annual

salary to $41,000.00 plus an annual bonus of $2,780.00, for a total annual compensation of $43,780.00. On January 23, 1981, without prior warning, plaintiff was discharged by defendant. Plaintiff's annual performance appraisals, signed by his previous supervisors and Snyder, show plaintiff's performance was above average in every area and contain no adverse comments. Moreover, no negative comments concerning plaintiff's performance or behavior are contained in the Monthly Progress Reports of his supervisors, including Snyder, covering the period of 1969 through January, 1981.

Snyder authorized the discharge of plaintiff, allegedly upon the recommendation of Richard Rintelmann. Rintelmann held the position of Vice-President of Marketing for the Klenzade Division and had no supervisory authority over plain-

tiff. In reaching the decision to terminate plaintiff, both Snyder and Rintelmann admitted they did not review either plaintiff's personnel file or any records relating to his sales performance. They did not discuss the matter with plaintiff's two immediate superiors, and the plaintiff's immediate supervisor admitted he was "surprised" by the termination. Snyder testified that at the time he did not know plaintiff's sales budget or if his sales had exceeded his budget.

Defendant alleges and offered evidence that the plaintiff was discharged because his sales activity was "flat", as "indicated by the absence of sales for COP systems", and because of a history of behavior problems, although Snyder stated in his deposition that behavior was not

considered.

Plaintiff's sales for the fiscal year June 30, 1979-July 1, 1980 were well over his budget of $700,000.00. Sales were typically slow in the early part of each fiscal year; however, plaintiff was on budget in January, 1981.

After plaintiff's discharge, he was offered a position as sales representative. The plaintiff testified that this position involved the same activities he was performing when discharged, but that he would be compensated on a commission basis rather than by salary and that he would be responsible for advancing his own expenses.

There is no evidence that the plaintiff had a contract of employment guaranteeing him employment for any definite or indefinite period of time. While the plaintiff testified that in 1966 he was

told that he would have a job until retirement, such a promise, if made, was gratuitous and not conditioned upon any act by the plaintiff.

Plaintiff sought other employment after termination with limited success. He obtained a job with American Dairy Review at $2,000.00 per month which terminated when it merged with another company. He earned $4,000.00 in this capacity before termination. Plaintiff also unsuccessfully sought employment through the Illinois Unemployment Agency and two private employment services.

DISCUSSION

Statute

Section 623(a) of the Age Discrimination in Employment Act, 19 U.S.C. § 621 et seq., hereinafter referred to as the "ADEA") makes it unlawful for an employer:

> To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals age.

Burden of Proof

The plaintiff's burden of proof in an age discrimination case is to show that age was a factor in the decision to terminate him. Age need not be the sole motivating factor, but it must have been the "'determining factor' in his discharge in the sense that 'but for' his employer's motive to discriminate against him because of age, he would not have been discharged." Kephart v. Institute of Gas Technology, 630 F.2d 1217, 1222 (7th Cir. 1980); Loeb v. Textron, 600 F.2d 1003, 1019 (1st Cir. 1979).

The basic allocation of burdens and order of presentation of proof in a Title

VII case is as follows: First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, non-discriminatory reason for the employee's discharge. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintinff remains at all times with the plain-

tiff. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981). See also Board of Trustees of Kenne State College v. Sweeney, 439 U.S. 24, 25, n.2, (1978); see generally, 9 J. Wigmore, Evidence § 2489 (3rd ed. 1940) (the burden of persuasion never shifts).

The burden that shifts to the defendant is to rebut the presumption of discrimination by producing evidence that the plaintiff was fired for legitimate, non-discriminatory reasons. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of

admissible evidence, the reasons for the plaintiff's discharge. The explanation must be legally sufficient to justify a judgment for the defendant. If the defendant carries the burden of production, the presumption raised by the prima facie case is rebutted, 1/ and the factual inquiry

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1/ "In saying that the presumption drops from the case, we do not imply that the trier of fact no longer may consider evidence previously introduced by the plaintiff to establish a prima facie case. A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual. Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross examination of the defendant, will suffice to discredit the defendants explanation." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255, f.n. 10 (1981).

proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

The plaintiff retains the burden of persuasion. He must demonstrate that the proffered reasons were not the true reasons for his firing. This burden must now merge with the ultimate burden of persuading the court that he has been the victim of age discrimination. He may do this either directly by persuading the court that a discriminatory reason more

likely motivated the employer, or indirectly by showing that the employer's proffered explanation is unworthy of credence.

A recent Seventh Circuit case, Roderick LaMontagne v. American Convenience Products, Inc., No. 83-2493 (7th Cir. December 27, 1984), is in accord with the principles enunciated above. In LaMontagne, the Seventh Circuit set forth the method of proof in an age discrimination case as follows:

> "The plaintiff may try to meet his burden of proof directly, by presenting direct or circumstantial evidence that age was a determining factor in his discharge. See Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 239 (4th Cir. 1982); Stanojev v. Evasco Services, Inc., 643 F.2d 914, 920-21 (2nd Cir. 1981); Spanuolo v. Whirlpool Corp., 641 F2d 1109, 1113 (4th Cir.), cert. denied, 454 U.S. 860 (1981).
>
> By far the more common method of proof, however, is that set forth

in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This indirect proof, as elaborated and clarified in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), requires the plaintiff first to prove a prima facie case of discrimination by showing (1) that he was in the protected class, (2) that he was doing the job well enough to meet his employer's legitimate expectations, (3) that in spite of his preformance he was discharged, and (4) that the employer sought a replacement for him. [2/] Huhn v. Koehring, 718 F.2d 239, 243 (7th Cir. 1983); Loeb v. Textron, Inc., 600 F.2d 1003, 1013 (1st Cir. 1979). Success gives rise to a rebuttable presumption of discrimination, and the burden then falls on the defendant to articulate lawful reasons for the discharge. The defendant's burden is only one of production; the burden of persuasion rests at all times on the plaintiff. If

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2/ In force reduction cases, it is not necessary for the plaintiff to demonstrate his employer sought a replacement. Haydon v. Rand Corp., 605 F.2d 453, 454 f.n. 1 (9th Cir. 1979); Williams v. General Motors Corp., 656 F.2d 120, 127-130 (5th Cir. 1981), cert. denied, 455 U.S. 943 (1982).

> the defendant articulates lawful reasons, the presumption is dissolved, and the burden falls on the plaintiff to prove that the proffered reasons are a pretext, by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence. See Burdine, 450 U.S. at 253-56." Slip op. at 5-6.

Application to this Case

Applying these principles to the present case, it is undisputed that (1) the plaintiff was in the protected class and (2) that he was discharged.

The plaintiff presented substantial direct evidence of age discrimination. Snyder assumed responsibility for the Klenzade Division approximately a year before the plaintiff's discharge. Subsequently, the record reveals that Snyder intended to get rid of the inherited sales force of "old salesmen" and replace them with "bright young people".

The record further reveals, and the court finds, that the plaintiff was doing his job well enough to meet the defendant's legitimate expectations. Although the defendant presented considerable evidence of the plaintiff's conduct, which it alleges was responsibile for his discharge, the court finds it unworthy of credence. All of the evidence presented by the defendant was based upon incidents which occurred long before the actual discharge. The most persuasive evidence shows that the plaintiff was meeting the legitimate expectations of the defendant. The plaintiff's long employment history with the defendant reveals a successful career in the sale of chemicals and equipment. Most importantly, his personnel file contains only favorable performance appraisals by his supervisors throughout his long career. In addition, the plain-

tiff had received a raise effective January 1, 1981 increasing his annual salary to $41,000 plus an annual bonus of $2,780, for a total annual compensation of $43,780. He was discharged, without warning, on January 23, 1981, just three weeks later. In fact, the plaintiff's annual and monthly performance appraisals contained no adverse comments concerning either his performance or his behavior. These reports covered a substantial period of the plaintiff's employment history (1969-1981), and are easily the most credible evidence of his job performance. Furthermore, his immediate superior was "surprised" by the plaintiff's termination.

The court gives little weight to the defendant's proffered reasons for the plaintiff's discharge, including that his

sales were "flat", when in fact, he had exceeded his budget by over $100,000 (or 118%) the previous fiscal year; that he had "behavior" problems, including drinking on the job, when in fact, these incidents had occurred in a time period long before his discharge and were not thought to be serious enough to place them in his monthly or yearly appraisals. Nor were the alleged incidents of drinking on the job considered serious enough to have his supervisor warn the plaintiff that his conduct would not be tolerated. In any event, the subject incidents had occurred long before the dischage and should be accorded little weight.

Another factor which militates against the defendant's position that the plaintiff was discharged because of behavioral problems is that at the time of his discharge, he was offered a position as a

sales representative for the defendant. In this position, plaintiff would have continued to call on customers of the defendant. The only difference is that the plaintiff would have been paid on a commission basis. It hardly seems plausible that the defendant would offer such a position to someone who it knew had behavioral problems which might embarrass the defendant or cause it to lose sales. On the contrary, it is one more factor which weighs in favor of the plaintiff's position that age was "a determinative factor" in his discharge. In other words, "but for" the plaintiff's age, he would not have been discharged.

Nor does the court accept the defendant's position that the plaintiff was discharged solely because of a reduction in force. It is clear from the evidence,

that the duties previously performed by the plaintiff as OEM Sales Manager are still being performed by James Watson and Robert Price, both employees younger than the plaintiff. Furthermore, at the time of plaintiff's termination, the defendant was advertising for positions in the Klenzade Division's sales force. Plaintiff had held such positions in the past and was qualified to perform the duties of such a position. His supervisor testified that his skills for these positions were "superior".

Although the record in this case reveals that his duties were assumed by younger persons, replacement by a younger person in the position is not a critical element of the plaintiff's case. 3/ When the defendant in an age discrimination

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3/ See footnote 2, supra.

case has a reduction in force, a prima facie case of age discrimination may be established if the plaintiff shows that he was within the protected age bracket, that he was discharged, that he was qualified to assume another position at the time, and that there is direct or circumstantial evidence of the defendant's intent to discriminate. There is ample evidence in this case to satisfy all of these elements.

Willful Violation

The plaintiff argues that the defendant should also be held liable for a willful violation of Section 7(b) of the ADEA, 29 U.S.C. § 626(b) (1976), which allows liquidated damages in the event of willful violations of the Act.

Neither the statute nor legislative history has defined the term "willful." The Seventh Circuit, however, in a very

recent case, Syvock v. Milwaukee Boiler Mfg. Co., Inc., 665 F.2d 149 (1981), extensively discussed the meaning of "willful" and set forth the standard for establishing a "willful" violation of the Act. The Court stated:

> The standard of willfulness therefore should focus on the defendant's state of mind at the time the allegedly discriminatory acts occurred. It must distinguish those situations in which an employer consciously discriminates against an employee because of age from those in which the discrimination is unconscious. This distinction is just as necessary in disparate treatment cases as it is when the plaintiff sues on a discriminatory impact theory. We think that a finding of willfulness should lie only if there is some showing as to the defendant's knowledge of the illegality of his actions. We hold that, in order to prove willfulness under 29 U.S.C. § 626(b) (1976), a plaintiff must show that the defendant's actions were knowing and voluntary and that he knew or reasonably should have known that those actions violated the ADEA. (emphasis added) Id. at 155-56.

The Court further held that "a finding of pretext does not necessarily compel a finding of willful discrimination." Id. at 157.

In this case, while it is clear that the evidence supports a finding, based upon a preponderance of the evidence, of age discrimination against the plaintiff, it is not so clear that the defendant's actions were a willful violation of the Act. While there is some evidence that Snyder knew that his actions were a violation of the ADEA, the plaintiff carries a very heavy burden to establish a willful violation in an age discrimination case. In addition to establishing that the violation was knowing and voluntary, he must also show that the employer knew or should have known that those actions violated the ADEA. Although the evidence supports a finding of age discrimination,

there is simply insufficient evidence on the question of whether the defendant knew or should have known that its actions violated the ADEA. The court, therefore, declines to assess liquidated damages.

Damages

The plaintiff argues for damages totalling between $489,173 and $911,069. Had he remained in the position he was in at the time of his termination and retired at the age of 70, plaintiff contends his damages would be $489,173.00. Alternatively, had he been promoted and retired at the age of 70, plaintiff argues his damages would be $911,069. Finally, had he been given the position given one of the individuals assuming his duties and retired at the age of 70, plaintiff argues that he would be entitled to damages in the sum of $552,201.

The court rejects the plaintiff's argument that he would have received the promotion described, and further rejects the plaintiff's position that he is entitled to be compensated for employment to age 70. There is simply insufficient evidence to support either of those propositions.

The court rejects the defendant's contention that the plaintiff should be entitled to no damages because he failed to mitigate damages. No evidence was presented that there were positions available to a person of the plaintiff's age and experience. Moreover, there is evidence that the plaintiff did attempt to obtain employment in his occupation without success. That a person in his position was not successful in his quest for employment is not at all surprising to this court. It is, in fact, a classic example of one

reason for the passage of the ADEA, namely, to prevent the discharge of employees who are in the twilight of their careers and who have little prospect for re-employment.

On Count I of the plaintiff's complaint, the court finds that the plaintiff is entitled to damages in the sum of $88,000.00, representing his net loss for the years to age 65.

On Count II of the plaintiff's complaint, the court finds that there was no employment contract, express or implied between the plaintiff and defendant.

The plaintif is also entitled to reasonable attorney's fees, and costs of suit.

It is ordered:

(1) That judgment is entered in favor of the plaintiff, John McNeil, and against

the defendant, Economics Laboratory, Inc., in the sum of $88,000.00, plus costs of suit.

(2) The plaintiff is ordered to submit his bill of costs and his petition for reasonable attorney's fees, with supporting affidavits and memoranda, within fourteen (14) days of the entry of this order.

ENTER:

/s/Stanley J. Roszkowski
Stanley J. Roszkowski, Judge
United States District Court

Dated: /January 30, 1985

APPENDIX C

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604
December 8, 1986.
Before
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. TERENCE T. EVANS, District Judge*

JOHN W. McNEIL,	)	Appeal from the
	)	United States
Plaintiff-Appellee,	)	District Court
Cross-Appellant,	)	for the Northern
	)	District of
No. 85-1398 vs.	)	Illinois, Western
	)	Division.
ECONOMICS LABORATORY,	)	
INC.,	)	No. 81 C 20150
	)	Stanley J.
Defendant-Appellant,	)	Roszkowski,
Cross-Appellee.	)	Judge.

O R D E R

On consideration of the petition for rehearing filed in the above-entitled cause by John W. McNeil, a majority of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is, hereby DENIED.

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* Honorable Terence T. Evans, District Judge for the Eastern District of Wisconsin, is sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604
December 8, 1986.
Before
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. TERENCE T. EVANS, District Judge*

JOHN W. McNEIL,	)	Appeal from the
	)	United States
Plaintiff-Appellee,	)	District Court
Cross-Appellant,	)	for the Northern
	)	District of
No. 85-1332 and vs.	)	Illinois, Western
85-1398	)	Division.
	)	
ECONOMICS LABORATORY,	)	
INC.,	)	No. 81 C 20150
	)	Stanley J.
Defendant-Appellant,	)	Roszkowski,
Cross-Appellee.	)	Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by Economics Laboratory, Inc., no judge of this court in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is, hereby DENIED.

* Honorable Terence T. Evans, District Judge for the Eastern District of Wisconsin, is sitting by designation.

APPENDIX E

29 USCS §623(a) EMPLOYER PRACTICES. It shall be unlawful for an employer --

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which owuld deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act [29 USCS §§621 et seq.].

APPENDIX F

29 USCS §626 RECORDKEEPING, INVESTIGATION, AND ENFORCEMENT.

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations. The Secretary shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this Act in accordance with the powers and procedures provided in sections 9 and 11 of the Fair Labor Standards Act of 1938, as amended (29 USC 209 and 211) [29 USCS §§209, 211].

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damges; judicial relief; conciliation, conference, and persuasion. The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 USC 211(b), 216, 217) [29 USCS §§211(b), 216, 217], and subsection (c) of this section. Any act prohibited under section 4 of this Act [29 USCS §623] shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 USC 215) [29 USCS §215]. Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standrads Act of 1938, as amended (29 USC 216, 217) [29 USCS §§216, 217]: Provided, That

liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informlal methods of conciliation, conference, and persuasion.

APPENDIX G

(29 CFR 2617 [44 FR 66791] [effective 11.21.79] [§1627.3 under Subpart B - record to be kept relating to age; notice to be posted):

B. (i) Every employer who, in the regular course of his business, makes, obtains or uses any personnel or employment records relating to the following shall, except as provided in subparagraphs three and four of this paragraph, keep them for a period of one year from the date of the personnel action to which any records relate: (ii) promotion, demotion, transfers, selection for training, layoff, recall or discharge of any employee. . . (iv) when an enforcement action is commenced, the employer may be required to keep such documents until the final disposition of the action.

APPENDIX H

1. The policy manual of Economics Laboratory, Inc. provided:

Section D, p. 21-A:

Terminations may have legal consequences, particularly those involving employees protected by anti discrimination law. These laws generally protect employees from discrimination because of race, creed, color, sex, national origin, age (over 40), and handicapped.

If a termination involves a potential legal problem, review the determination in advance with a P and IR or the law department. Such advice should be sought as early as possible during the counseling progress.

2. Section B, p. 3 Fair Employment Practices:

A written record shall be made of situations involving significant or repeated breach of company work rules, or writeups should include one, name of employee; two, date of the incident; three, nature of the incident giving all the details; four, the date of the incident, the date the incident was discussed with the employee; five, the details of the discussion with the employee; and six, the action taken.

3. Economics Laboratory, Inc. official publication, Focus, January 1981:

Documentation essential in termination process . . . proper documentation is sup-

ported by. . . . recent legislation designed to protect employees from discriminatory employment practices, which demands that company-initiated terminations be well documented.